97-5737

No._____

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA K. FORNEY,

Petitioner,

ORIGINAL

vs.

JOHN J. CALLAHAN, Acting Commissioner,
Social Security Administration,

Respondent.

On Petition For A Writ Of Certiorari

To The United States Court Of Appeals

For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a Social Security Disability claimant who in district court procures a final judgment with an accompanying order of remand for additional administrative proceedings, pursuant to sentence four of 42 U.S.C. § 405(g), **appeal to the Circuit Court of Appeals on the ground that broader relief (*e.g.*, an outright award of disability benefits) should have been granted by the district court**, based on issues which the district court decided adversely to the claimant?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sandra K. Forney (hereinafter "Forney"), respectfully petitions this Court to issue a *writ of certiorari* to review the March 4, 1997, published OPINION of the United States Court of Appeals for the Ninth Circuit (hereinafter, Ninth Circuit), declining to permit Forney immediately to appeal adverse rulings of the district court and dismissing her appeal.

In the U.S. District Court for the District of Oregon, Forney sought judicial review of the final decision of the Commissioner of the Social Security Administration[1] which denied Forney's application for Social Security disability benefits protectively filed on November 18, 1991. The district court held against Forney on three substantive issues. Pursuant to the fourth sentence of 42 U.S.C. § 405(g), the district court then remanded Forney's Social Security disability case to the Social Security Administration for further proceedings with regard to an unrelated fourth issue.

Forney sought immediately to appeal to the Ninth Circuit the district court's three adverse rulings. However, the Ninth Circuit dismissed Forney's appeal, holding that Forney is precluded from appealing the district court's adverse rulings until after the agency completes remand proceedings with regard to the fourth unrelated issue. At that time, the Ninth Circuit held, if Forney has not been granted disability benefits, she may file a new and separate civil action to seek review of the district court's adverse rulings in the instant civil action.

Because Forney believes the Ninth Circuit's decision conflicts with Supreme Court precedent and the express language of 42 U.S.C. § 405(g), she hereby petitions for a *writ of certiorari*.

/ / /

[1] Pursuant to § 106(d) of P.L. 103-296, the Social Security Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in Social Security cases was transferred to the Commissioner of the Social Security Administration, effective March 31, 1995. Although the Secretary of Health and Human Services was responsible for the actions of the Social Security Administration at the time of the final decision in this case, the undersigned refers to "the Commissioner" throughout this petition for the sake of convenience.

OPINIONS BELOW

Petitioner, Sandra K. Forney, filed an application for Social Security disability benefits on November 18, 1991. Forney alleged disability beginning June 7, 1991, and continuing. Following mesne administrative proceedings, by decision dated April 18, 1994, an administrative law judge (ALJ), Stephen P. Kramer found that Forney was not disabled. (Appendix at 26-38). The Appeals Council of the Social Security Administration declined to review the ALJ's decision. (Appendix at 39-40). This action resulted in the ALJ's decision becoming the agency's final decision pursuant to 42 U.S.C. § 405(g).

Forney appealed to the U.S. District Court for the District of Oregon, raising four issues. Following full briefing, U.S. District Judge, Robert E. Jones, by OPINION AND ORDER entered May 2, 1995, and JUDGMENT entered May 25, 1995, held against Forney on her first three issues[2] and held in her favor on the fourth[3]. Because of the district court's favorable ruling on Forney's fourth issue, the district court then reversed the ALJ's decision and remanded the matter, pursuant to sentence four of 42 U.S.C. § 405(g), for additional administrative proceedings.

Forney sought immediately to appeal the district court's three adverse rulings to the Ninth Circuit. Specifically, Forney argued that the district court incorrectly had held against Forney on those three issues, and that if the Ninth Circuit correctly were to resolve those issues, remand *for payment of benefits* (instead of remand for additional proceedings) would be mandated. By published OPINION filed March 4, 1997 (see Forney v. Chater, 108 F.3d 228 (9th Cir. 1997)), the court of appeals declined to permit Forney immediately to appeal the adverse rulings of the district court and dismissed her appeal. (Appendix at 5-13). Specifically, the Ninth Circuit held as follows:

> Forney prevailed in district court by securing a remand to the Secretary pursuant to sentence four of 42 U.S.C. § 405(g). The remand order terminated her civil action

[2] See Appendix at 22-24.

[3] See Appendix at 24-25.

favorably to her, and she is the prevailing party. As a prevailing party, she cannot appeal the remand order. Accordingly, Forney's appeal is DISMISSED.
(See Appendix at 13).

By Order filed May 29, 1997, the U.S. Court of Appeals for the Ninth Circuit denied Forney's petition for rehearing. (Appendix at 41).

GROUNDS FOR JURISDICTION

The published OPINION of the U.S. Court of Appeals for the Ninth Circuit was entered March 4, 1997. (Appendix at 1-13). Forney's petition for rehearing was denied by Order filed May 29, 1997. (Appendix at 41). The instant petition for a *writ of certiorari* is filed within 90 days of the denial of the petition for rehearing and is timely under Supreme Court Rules 13.3, 29.2, and 30.1.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The following statute, 42 U.S.C. § 405(g) is at issue in the instant appeal:

42 U.S.C. § 405(g) Judicial review.

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides.... [...] As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. **The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.** The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be

taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. **The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions**. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.
42 U.S.C. § 405(g) (bold emphases added).

STATEMENT OF THE CASE

Forney seeks review of a judgment of the U.S. Court of Appeals for the Ninth Circuit. The basis for federal jurisdiction in the court of first instance, the U.S. District Court for the District of Oregon, was pursuant to 42 U.S.C. § 405(g), following issuance of a final decision by the Commissioner of the Social Security Administration.

Forney petitions for a *writ of certiorari* to review the OPINION of the Ninth Circuit dismissing Forney's appeal of the district court's adverse rulings.

The following facts are material to consideration of the questions presented:

1) The district court held against Forney on three issues. (See Appendix at 22-24, sections I, II, and III).

2) A holding favorable to Forney on any one of the three adverse rulings would have resulted in a remand for payment of benefits, without additional administrative proceedings. **Remand for payment of benefits constitutes <u>all the relief Forney sought</u>.**

3) The district court held in Forney's favor on an unrelated fourth issue, and remanded the case for further proceedings, pursuant to the fourth sentence of 42 U.S.C. § 405(g). (See Appendix at 24-25, section IV). **Remand for additional proceedings is <u>less than all the</u>**

relief Forney sought,[4] and it is not reasonably foreseeable that remand for additional proceedings will lead to Forney's obtaining all the relief sought.

4) The fourth sentence of 42 U.S.C. § 405(g) provides as follows:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

5) Describing the appealability of a final judgment entered pursuant to the fourth sentence of 42 U.S.C. § 405(g), the eighth sentence of 42 U.S.C. § 405(g) provides as follows:

> The judgment of the court shall be final except that it shall be subject to review **in the same manner as a judgment in other civil actions**. (Emphasis added).

6) "[I]n other civil actions," plaintiffs who obtain less than all the relief sought normally have the right to appeal "adversely decided" issues to the appellate court in an attempt to obtain all the relief sought.

7) Because Forney did not prevail on the district court's three adverse rulings, and because **she did not obtain all the relief sought**, Forney sought review by the Ninth Circuit of the district court's three adverse rulings.

8) In a decision which has been published in the Federal Reporter as Forney v. Chater, 108 F.3d 228 (9th Cir. 1997), the Ninth Circuit held that Forney prevailed in district court by securing a remand pursuant to sentence four of 42 U.S.C. § 405(g). Because the remand order terminated her civil action favorably to her, she is the prevailing party. As a prevailing party, she cannot immediately appeal the district court's adverse rulings and order of remand.

9) With regard to the district court's three adverse rulings, Forney is not a prevailing party.

10) Forney asserts that she has the right immediately to appeal the district court's three

[4] As will be discussed below, because the remand order directs the agency to apply an improper legal standard upon remand, remand for additional proceedings is, essentially, no relief at all. Instead, in all probability, it merely imposes an additional two-year delay before Forney is permitted meaningful judicial review.

adverse rulings, and that she has a right to seek, on appeal, all the relief sought before the district court.

REASONS FOR GRANTING THE WRIT: ARGUMENT

Petitioner Forney respectfully submits this case presents an important federal question for which there are compelling reasons the petition for a *writ of certiorari* should be granted. Because the Social Security Act is a federal program, national in scope and remedial in purpose, there is a compelling need for meaningful appellate review of the agency's findings.

First, this case involves a split in the circuits courts of appeal over an important question of federal law. This Court should resolve this circuit split.

Second, this case involves an important question of federal law which, according to the Ninth Circuit, has not been settled by the Supreme Court. This Court should settle this important federal question.

Finally, in its published OPINION, the Ninth Circuit has decided an important federal question in a way which conflicts with this Court's holdings in Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990) and Shalala v. Schaefer, 113 S.Ct. 2625 (1993).

This Court should grant the petition for a *writ of certiorari* in order to resolve the issue of whether or not a Social Security disability claimant has the right, upon procuring a final judgment with an order of remand for additional proceedings, pursuant to sentence four of 42 U.S.C. § 405(g), immediately to appeal the district court's adverse rulings on issues unrelated to the issue which formed the basis for the remand order, and to seek on appeal all the relief sought before the district court.

It is not contested that, in many circumstances, federal court orders remanding cases to administrative agencies for further proceedings are interlocutory orders which are not immediately appealable. Indeed, such may be the general rule. However, Forney contends that the instant case is distinguishable from such a general rule, because Congress and the Supreme Court expressly have defined Social Security disability claimants as a class of plaintiffs that may appeal

from final judgments entered pursuant to sentence four of 42 U.S.C. § 405(g), *even though* those final judgments may be accompanied by remand orders.

The fourth sentence of 42 U.S.C. § 405(g) provides as follows:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

42 U.S.C. § 405(g), sentence four.

It is uncontested that the district court remanded the instant case pursuant to the foregoing fourth sentence of 42 U.S.C. § 405(g). Specifically, the district court affirmed the agency's findings on three issues, then "remand[ed] the cause for a rehearing" based on a fourth, unrelated, issue.

The eighth sentence of 42 U.S.C. § 405(g) provides as follows:

> The judgment of the court shall be final **except that it shall be subject to review in the same manner as a judgment in other civil actions**.

42 U.S.C. § 405(g), sentence eight (all emphases added).

At slip op. 2244 (reproduced at Appendix page 10), the Ninth Circuit correctly held that the sentence four remand judgment herein is "final"[5] with respect to "all parties...." (Appendix at 10). However, the Ninth Circuit then held that Forney nevertheless does not have the right immediately to appeal the adverse findings contained in that final judgment and to seek on appeal the relief denied by the district court. (See Appendix at 11 and 13). Instead, the Ninth Circuit held that Forney must acquiesce in the order of remand and endure the remand proceedings. If, following the administrative proceedings upon remand, Forney has not been found disabled, and she still desires to pursue her disability claim, she must file a new and separate civil action in district court before being able to appeal the district court's adverse rulings in the instant case.

Forney contends that the Ninth Circuit's holding conflicts with the plain language of 42 U.S.C. § 405(g), sentence eight, quoted above, and that the court's holding conflicts with Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990), where the Supreme Court held that a remand judgment

[5] That is, the judgment is not merely interlocutory, and it "terminates the civil action." (Appendix at 9-10, citing Sullivan v. Finkelstein, 110 S.Ct. 2658 (1990); emphasis added by Forney).

entered pursuant to the fourth sentence of 42 U.S.C. § 405(g) is "a final, appealable judgment *even though* that judgment may be accompanied by a remand order." Finkelstein at 2666 (emphases added).

In Finkelstein, the Supreme Court addressed this issue and reached a different conclusion than did the Ninth Circuit in the instant case. In Finkelstein, this Court held as follows:

> Respondent also argues that the eighth sentence of § 405(g), providing that the judgment of the district court "shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions," does not compel the conclusion that a judgment entered pursuant to the fourth sentence is immediately appealable. In respondent's view, Congress used the the term "final" in the eighth sentence only to make clear that a court's decision reviewing agency action could operate as law of the case and res judicata. Cf. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 78 S.Ct. 1209, 1218, 2 L.Ed.2d 1345 (1958). But even if it is true that Congress used the term "final" to mean "conclusively decided," this reading does not preclude the construction of "final" to include "appealable," a meaning with which "final" is usually coupled. Nor does respondent consider the significance of Congress' use of the term "judgment" to describe the action taken by the District Court in this case. [Footnote omitted]. Although respondent argues that the words "final decisions," as used in 28 U.S.C. § 1291, encompass no more than what was meant by the terms "final judgments and decrees" in the predecessor statute to § 1291, respondent recognizes that "final judgments" are at the core of matters appealable under § 1291, and **respondent does not contest the power of Congress to define a class of orders as "final judgments" that by inference would be appealable under § 1291**. Cf. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434, 76 S.Ct. 895, 899, 100 L.Ed. 1297 (1956). **This is what Congress has done in the fourth sentence of § 405(g)**. [Footnote omitted].
>
> More generally, respondent argues that a power in the district court to remand to an agency is always incident to the power to review agency action and that § 405(g) only expanded the district courts' equitable powers; therefore, she insists, it is improper to construe § 405(g) as a limit on the district courts' power to remand. This argument misapprehends what Congress sought to accomplish in § 405(g). The fourth sentence of § 405(g) does not "limit" the district courts' authority to remand. Rather, **the fourth sentence directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order**. The fourth sentence does not require the district court to choose between entering a final judgment and remanding; to the contrary, it specifically provides that a district court may enter judgment "with or without remanding the cause for a rehearing."

Finkelstein 110 S.Ct. at 2665-66 (bold and underlined emphases added).

It is beyond question that Forney could have appealed the district court's adverse findings had the district court not "accompanied [its judgment with] ...a remand order." In accordance with Finkelstein, Forney maintains that the Ninth Circuit court's OPINION is in error, and that the district court's judgment in this case is appealable "*even though* that judgment [was] accompanied by a remand order." Finkelstein 110 S.Ct. at 2666 (emphases added).

Indeed, in footnote 3 of Finkelstein, this Court expressly notes, "In other cases **the district court may order a remand to the agency but the person seeking judicial review may seek to appeal on the ground that broader relief should have been granted by the district court**."[6] Finkelstein 110 S.Ct. at 2663, footnote 3 (bold emphasis added). Forney contends that this Court's ultimate holding in Finkelstein, and the plain language of 42 U.S.C. § 405(g), both mandate the conclusion that plaintiffs in Forney's position "may seek to appeal on the ground that broader relief should have been granted by the district court."

Forney also contends that the Ninth Circuit's OPINION conflicts with Shalala v. Schaefer, 113 S.Ct. 2625 (1993), where the Supreme Court, quoting from sentence eight of § 405(g), clarified that the judgment authorized by sentence four of 42 U.S.C. § 405(g) "shall be final except that **it shall be subject to review in the same manner as a judgment in other civil actions**." Schaefer 113 S.Ct. at 2629 (all emphases added). Contrary to this Court's holding in Schaefer, in the instant case, the Ninth Circuit held that Forney's sentence four judgment is not "subject to review in the same manner as a judgment in other civil actions." Instead, the Ninth Circuit held that Forney's final judgment is appealable only in the same manner as interlocutory orders normally are appealable in other civil actions (*i.e.*, they aren't). This holding conflicts with Supreme Court precedent, and it contravenes the plain language of 42 U.S.C. § 405(g).

In holding that Forney's sentence four judgment is not immediately appealable, the Ninth Circuit failed adequately to distinguish between remand judgments which terminate the civil action and remand orders which are merely interlocutory. The court's holding conceivably could lead to an endless circle of civil actions and district court remands, wherein Forney would never be afforded appellate review.

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[6] For this proposition, the Court cited Bohms v. Gardner, 381 F.2d 283 (CA8 1967), *cert. denied*, 390 U.S. 964, 88 S.Ct. 1069, 19 L.Ed.2d 1164 (1968), then stated, "None of these situations are presented in this case, and we express no opinion about appealability in those circumstances." Id. Bohms involved a **sentence six** remand, and the conclusion reached by the Bohms court (appeal dismissed because a **sentence six** remand is not a final judgment) is fully consistent with Finkelstein, which holds that a **sentence four** remand is a final judgment, and with Schaefer, 113 S.Ct. at 2631, which holds that a **sentence six** remand is not a final judgment.

Forney applied for benefits 5½ years ago. Her claim was denied and she requested reconsideration. Her claim was denied again, and she requested a hearing. After a hearing, her claim was denied a third time, and she requested review by the Appeals Council. The Appeals Council remanded the case for another hearing, after which Forney's case was denied yet a fourth time. She again requested Appeals Council review, and the Appeals Council denied her claim for a fifth time. Forney appealed to federal court. Three and one half years after Forney applied for disability benefits, the district court remanded Forney's case for yet a third hearing, and directed the agency to apply an improper standard which seriously prejudices Forney's case.

Since June 7, 1991, over six years ago, Forney has been unable to work and unable to support herself. The Ninth Circuit court's OPINION holds that after being denied benefits by the agency five times after two hearings, one intra-agency remand, and one federal court remand, over the course of three and one half years, Forney does not have the right to appellate review of those issues which, if correctly decided by the appellate court, would warrant remand for an immediate award of disability benefits.

Upon remand, the agency will adjudicate Forney's case by applying the incorrect standards dictated by the district court's remand order. Based on the undersigned's experience, it will take approximately two years for Forney's case to work its way down through the agency's Appeals Council, back to another hearing and denial, back up to the Appeals Council, and back to federal court. Approximately two years' time will be expended on the application of the improper legal standard dictated by the district court's remand order, and it is not reasonably foreseeable that Forney will be any better off after the remand proceedings are completed. At the end of the unproductive remand proceedings, it will have been approximately 8 years since Forney applied for benefits, and if the district court again remands her case to the agency, she again will be without the right to appellate review. This cycle conceivably could continue *ad infinitum*, with Forney never being afforded the right to meaningful appellate review. **This** is not, in the words of the Ninth Circuit, "judicial economy." See slip op. at 2245. (Appendix at 11).

/ / /

The Ninth Circuit's rationale regarding judicial economy (see Appendix at 11) does not apply herein. The instant case does not represent a "piecemeal" appeal, which "normally will leave further administrative proceedings to follow regardless of the outcome of the appeal." Slip op. 2245, fn 6. (Appendix at 11). Instead, if the appellate court addresses Forney's arguments on the merits, and if the appellate court holds in Forney's favor on the matters she seeks to appeal, the court will order an award of benefits, and the matter will be at an end. Nor is Forney at all likely "on remand, [to] secure all the relief she seeks," as the Ninth Circuit speculates at slip op. 2245. (Appendix at 11). Instead, given the district court's adverse and incorrect findings, and given that the agency will apply incorrect legal standards during the remand proceedings, it is virtually certain that Forney will be back before the district court pursuing her claim in yet another civil action several years from now.

THE CIRCUITS ARE SPLIT

The Seventh, Ninth, and Tenth Circuits have published opinions permitting immediate appeals, by prevailing plaintiffs, of judgments of remand pursuant to 42 U.S.C. § 405(g), sentence four. See Richmond v. Chater, 94 F.3d 263 (7th Cir. 1996), Atkins v. Shalala, 837 F.Supp. 318 (D.Or. 1993), *as modified by* Atkins v. Shalala, 70 F.3d 529 (9th Cir. 1995), and Nguyen v. Shalala, 43 F.3d 1400 (10th Cir. 1994). Ironically, because of the conflict between the published decision in Atkins and the published decision in Forney, the Ninth Circuit also has an intra-circuit conflict.

Richmond, Atkins, and Nguyen are consistent with this Court's holdings in Finkelstein and Schaefer that remand orders pursuant to sentence four of § 405(g) are **appealable**, *even though* accompanied by a remand order. This Court should grant the petition for a *writ of certiorari* and so find. Because the Ninth Circuit's decision creates an inter-circuit conflict and because it conflicts with both this Court's precedential holdings and the Social Security Act, this Court should issue a *writ of certiorari* to review the decision of the U.S. Court of Appeals for the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Forney respectfully prays that this Court issue a *writ of certiorari* to review the OPINION of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANDRA K. FORNEY,
Plaintiff-Appellant,
v.
SHIRLEY S. CHATER, Secretary, Commissioner, Social Security Administration,
Defendant-Appellee.

No. 95-35560
D.C. No.
CV-94-06357-REJ
OPINION

Appeal from the United States District Court
For the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
November 8, 1996—Portland, Oregon

Filed March 4, 1997

Before: William C. Canby, Jr., Pamela Ann Rymer, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Government Law/Social Security

The court of appeals affirmed a judgment of the district court. The court held that a social security disability claimant prevailing in the district court to the extent of winning a remand pursuant to sentence four of 42 U.S.C. § 405(g) is not entitled to appeal.

Appellee Social Security Administration (Secretary) denied appellant Sandra Forney disability benefits. An administrative law judge (ALJ) upheld the denial. Forney sought review in district court. As to three of her contentions, the court ruled against Forney, holding that the ALJ did not err in rejecting her physician's testimony; in discrediting her pain testimony; or in ruling that a hypothetical question to the vocational expert included all of her relevant physical limitations. As to her fourth contention, the court ruled in her favor, holding that the vocational expert incorrectly selected as employment available to Forney several occupations that required reaching. The court remanded for further inquiry into whether there were any occupations that Forney, with her impaired reaching ability, could engage in.

Forney appealed the first three rulings.

[1] The threshold question was whether Forney could appeal when the district court ordered a remand under sentence four that might result in an award of all benefits she claimed.

[2] A few years ago, the district court's decision would not have been said to be "final." [3] In a 1990 case, the Supreme Court permitted the Secretary to appeal as final a decision remanding a social security disability claim for further administrative proceeding. As in prior Ninth Circuit decisions, the Supreme Court pointed out that should the Secretary on remand undertake the inquiry mandated by the district court and award benefits, it would be doubtful whether he could appeal his own order.

[4] The fourth sentence of § 405(g) authorizes the district court "to enter 'a judgment' affirming, modifying, or reversing the decision of the Secretary *with or without remanding the cause for a rehearing.*" The Supreme Court held that the district court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the

Secretary's final determination that the claimant was not entitled to benefits. In light of that comment, it could not be concluded that the decision in this case was not final for Forney as well as for the Commissioner.

[5] A civil action ending in a sentence-four remand is "final" for all parties to it. [6] That fact, however, did not necessarily entitle Forney to appeal the district court's decision. A prevailing party normally may not appeal the decision in its favor. A claimant "prevails" when he or she succeeds in securing a sentence-four remand that may result in an award of all the benefits claimed. [7] On remand, Forney might secure all the relief she sought. If she were to, a decision on the merits of the appeal would have been wholly unnecessary.

[8] If Forney were to be denied benefits on remand, she would have to seek review by commencing a new civil action. [9] The crucial question for Forney would arise on appeal of an adverse decision of the district court in her new civil action. Would she be foreclosed by principles of res judicata of collateral estoppel from litigating the issues decided against her in her first, final civil action, in which she "prevailed?" [10] The answer is, "no." It would be inappropriate to hold Forney to rulings that she had been precluded from appealing. [11] Further, collateral estoppel applies only to rulings that were essential to the judgment in the prior case and the district court's rulings against Forney were all unnecessary to the remand.

COUNSEL

Ralph Wilborn, Ralph Wilborn and Etta L. Wilborn, Eugene, Oregon, for the plaintiff-appellant.

Kathryn A. Warma, Assistant Regional Counsel, Social Security Administration, Seattle, Washington, for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

Sandra K. Forney appeals the district court's order that remanded to the Administrative Law Judge ("ALJ") Forney's application for disability benefits under the Social Security Act. A threshold issue is whether Forney, who has prevailed in district court to the extent of winning a remand pursuant to sentence four of 42 U.S.C. § 405(g), may now appeal the district court's ruling to this court. We conclude that she may not, and accordingly dismiss the appeal.

I. Facts

Forney applied for disability benefits in 1991. Her application was denied and she requested a hearing. An administrative law judge (ALJ) held a hearing and denied benefits. The ALJ's decision was reviewed by the Appeals Council, which remanded the matter to the ALJ for a further hearing. The ALJ again denied the claim, and this time the Appeals Council denied review.

Forney then sought review in district court, pursuant to 42 U.S.C. § 405(g). The district court ruled on four of Forney's contentions. First, it held that the ALJ did not err in rejecting the testimony of Forney's treating physician, because it conflicted with Forney's own testimony. Second, the district court upheld the ALJ's discrediting of Forney's testimony regarding the severity of her pain; the district court stated that the ALJ made specific findings regarding Forney's courtroom appearance and testimony that were sufficient to support the finding. Third, the court held that the hypothetical questions posed to the vocational expert included all of Forney's relevant physical limitations, in light of the permissible disregard of the testimony of her treating physician. Fourth and last, the district court ruled that the vocational expert incorrectly selected as employment available to Forney several occupa-

tions that required frequent or constant reaching, when the credited expert testimony was that Forney's capacity to reach was impaired. In consequence of this last ruling, the district court held that the Secretary had failed to sustain her burden of showing that Forney, who could no longer perform her previous work, can engage in substantial work in the economy. The district court then remanded the matter to the Secretary for further proceedings, which will presumably include further inquiry into whether there are any occupations that Forney, with her impaired reaching ability, can engage in.

II. Appealability

[1] Forney now appeals, seeking to challenge the district court's first three rulings. The threshold issue is whether Forney may appeal at this time when the district court has ordered a remand under sentence four of § 405(g) that may result in an award of all benefits she claimed. We conclude that she may not.

[2] A few years ago, before the Supreme Court's most recent pronouncements dealing with such remands, we would have said that the district court's decision was not "final," within the meaning of 28 U.S.C. § 1291, insofar as Forney is concerned. We so held in a similar situation in *Gilchrist v. Schweiker*, 645 F.2d 818, 819 (9th Cir. 1981). In *Gilchrist*, an ALJ had rejected a claim of disability from back pain, in part because the allegations of pain were inconsistent with the ALJ's personal observation of the claimant. The district court remanded the matter to the Secretary for reconsideration in light of the extensive medical history of Gilchrist's efforts to secure relief from pain. We held that this remand "does no more than order clarification of the administrative decision," and provided nothing final for us to review. *Id.* at 819.

Gilchrist was distinguishable from another line of our cases, in which we permitted the *Secretary* to appeal from an order of the district court deciding a separable legal issue and

remanding the matter to the administrative agency for further proceedings. The leading example is *Stone v. Heckler*, 722 F.2d 464, 466-68 (9th Cir. 1983). In *Stone*, an ALJ had applied the Secretary's medical-vocational guidelines to find no disability. On review, the district court held that the ALJ could not rely on those guidelines, but would have to make specific factual findings on jobs that the claimant could perform. *Stone*, 722 F.2d at 467. The Secretary appealed, arguing that the district court had applied an improper legal standard that would govern further proceedings and should be subject to immediate appellate review. We held that the district court's decision was "final" and appealable by the Secretary, stating:

> The district court's decision is adverse to the Secretary and, if wrong, would result in a totally wasted proceeding below, from which the Secretary may not be able to appeal. Deciding this legal issue now will promote the least possible waste of judicial resources.

Id. We recognized that numerous other courts, in deciding whether remand orders were appealable, had "especially considered whether a holding of nonappealability would effectively deprive the litigants of an opportunity to obtain review." *Id.*

We have followed *Stone* in other cases where the Secretary or similar administrative official sought to appeal orders remanding for administrative proceedings that would be governed by a separable, arguably incorrect, legal standard incorporated in the remand decision. *See Regents of the Univ. of Calif. v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985) (amended opinion) (Secretary of Health and Human Services may appeal adverse decision remanding for further administrative proceedings; *Kaho v. Ilchert*, 765 F.2d 877, 880-81 (9th Cir. 1985) (District Director of INS may appeal remand order). The key to all of these decisions is that, if no appeal

of the remand order were permitted, the Secretary might later be precluded from any appeal. The principle was best explained in *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990). In *Chugach*, we permitted the Secretary of the Interior to appeal a district court decision interpreting the Alaska Native Claims Settlement Act and remanding an affected Native group's boundary dispute to the Interior Board of Land Appeals. In explaining why we would review the statutory interpretation prior to the remand, we said:

> [F]ailing to permit immediate appeal might foreclose review altogether: Should the Secretary lose on remand, there would be no appeal, for the Secretary cannot appeal his own agency's determinations.

Id.; *see also United States v. Louisiana-Pacific Corp.*, 846 F.2d 43, 45 (9th Cir. 1988) (declining to permit United States to appeal remand order when it would have means of securing later review; distinguishing *Stone* where, after remand, "the Secretary would have no right to appeal").

These considerations do not apply, of course, to Forney. If she is denied benefits on remand, nothing prevents her from seeking review of the denial. Moreover, she may prevail in the administrative proceedings on remand and obtain complete relief. Accordingly, we would have been inclined, under our prior analysis, to hold that the district court's remand decision was not "final" as to Forney.

[3] In recent years, however, the Supreme Court has spoken in terms that necessarily modify our former approach to "finality" of remand decisions. In *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), the Court permitted the Secretary to appeal as final a decision remanding a Social Security disability claim for further administrative proceedings. As in our cases just discussed, the Court pointed out that, "should the Secretary on remand undertake the inquiry mandated by the District Court and award benefits, there would be grave doubt, as the

Court of Appeals recognized, whether he could appeal his own order." *Id.* at 625.

[4] In discussing the question of finality of district court decisions under § 405(g), however, the Court made clear that decisions by a district court remanding under the fourth sentence of § 405(g) ended the civil action brought to review the Secretary's initial decision.[1] "The use of the term 'a civil action' suggests that at least in the context of § 405(g), each final decision of the Secretary will be reviewable by a separate piece of litigation." *Id.* at 624-25. The fourth sentence of § 405(g) authorizes the district court "to enter 'a *judgment* affirming, modifying, or reversing the decision of the Secretary, *with or without remanding the cause for a rehearing*.' " *Id.* at 625 (quoting 405(g) (emphasis by the Supreme Court)). Thus, according to the Supreme Court:

> The District Court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue.

Id. In light of this comment that the remand order terminates the civil action, we cannot very well conclude that the deci-

[1]Remands are also authorized by the sixth sentence of § 405(g), and those remands do not necessarily terminate the civil action. The sixth sentence authorizes remands only when the Commissioner so moves before filing an answer, or when there is a showing of new material evidence and good cause for not earlier placing it in the record. Neither of these conditions is met in the present case. Forney's remand order therefore falls under the fourth sentence of 405(g). *See Finkelstein*, 496 U.S. at 626; *Shalala v. Schaefer*, 113 S. Ct. 2625, 2629 & n.2 (1993).

sion in our case is not final for Forney as well as for the Commissioner.[2]

The fact remains, however, that Forney possibly may obtain all of the relief she seeks in the administrative proceedings on remand. The considerations of judicial economy that, before *Finkelstein*, led us to hold remands generally non-final are still present. There is a temptation, accordingly, to resist the conclusion that *Finkelstein* makes a sentence-four remand final for the claimant as well as the Secretary. After all, the Court in *Finkelstein* stated that it was not making a rule for all remands: "There is, of course, a great variety of remands, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges." *Id.* at 623 (footnote omitted). The Court was only ruling on "whether orders of the type entered by the district court are immediately appealable *by the Secretary*." *Id.* And all but one[3] of the published decisions of the courts of appeals applying *Finkelstein* involve instances in which the Secretary or comparable agency official is allowed to appeal because, if the remand results in victory for the claimant, the Secretary will be unable to appeal. *See, e.g., St. Francis Medical Ctr. v. Sullivan*, 962 F.2d 1110, 1114 (3d Cir. 1992); *Colvin v. Sullivan*, 939 F.2d 153, 155 (4th Cir. 1991); *Travis v. Sullivan*, 985 F.2d 919, 922-23 (7th Cir. 1993); *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1009 (10th Cir. 1996).

[5] In the end, however, it is apparent that to conclude that a sentence-four remand is not final for the claimant is analytically untidy; it is flatly inconsistent with the Supreme Court's insistence in *Finkelstein* that a sentence-four remand termi-

[2]It makes no difference that the district court, in remanding, purported not to enter a judgment. The sentence-four remand order *is* a final judgment, whether or not denominated as such. *Shalala*, 113 S. Ct. at 2632 & n.6.

[3]For the one exception, see note 6, *infra*.

nates the civil action. Indeed, it is error for the district court to attempt to retain jurisdiction upon making a sentence-four remand. *See Shalala*, 113 S. Ct. at 2630. Thus the Fifth Circuit has interpreted *Finkelstein* to preclude a claimant who has been denied benefits administratively after a sentence-four remand from reinstating her district court action to secure further review. *Frizzell v. Sullivan*, 937 F.2d 254, 256-57 (5th Cir. 1991). In order to contest the post-remand denial of benefits, the claimant must institute a new action. *See id.* at 255. The civil action ending in a sentence-four remand, therefore, must be "final," in a formalistic sense, for all parties to it.[4]

[6] That fact, however, does not necessarily entitle Forney to appeal the district court's decision. A prevailing party normally may not appeal the decision in its favor. *See Electrical Fittings Corp. v. Thomas & Betts Corp.*, 307 U.S. 241, 242 (1939) ("A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining review of findings he deems erroneous which are not necessary to support the decree"); *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994) (following *Electrical Fittings*). There can be little doubt that a claimant "prevails" in the view of the Supreme Court when he or she succeeds in securing a sentence-four remand that may result in an award of all of the benefits claimed.[5] The Court so held for purposes of attorney's fee awards in *Shalala*, 113 S. Ct. at 2631.

[4]Although the language of § 405(g) and *Finkelstein*, 496 U.S. at 624-25, clearly support the notion that a claimant who has secured a sentence-four remand and then been denied benefits must bring a new action to contest the denial, the advantages of such a system do not spring readily to mind.

[5]As the Supreme Court recognized in *Finkelstein*, there may be instances when a claimant is foreclosed by the district court's remand decision from part of the benefits sought, and would then seek an appeal from the remand decision on the ground that broader relief should have been awarded. *See Finkelstein*, 496 U.S. at 623 n.3. Like the Supreme Court, we express no opinion on the right of the claimant to immediate appeal in that situation. *See id.* Implicit in this disclaimer, however, is the proposition that when the remand order does *not* foreclose the possibility of the claimant's obtaining all of the relief sought, it is not appealable by the prevailing claimant.

[7] It is true that the status of prevailing party for purposes of attorney's fees under 28 U.S.C. § 2412(d)(1)(B) does not automatically equate with status as prevailing party for purposes of appeal. There are compelling reasons, however, for declining to permit a claimant in Forney's position from appealing the remand order she succeeded in obtaining. They are the same reasons that underlay the long-established general rule that a remand to an administrative agency was not appealable, with an exception only for the Secretary who might be precluded from post-remand access to the court. *See, e.g., Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247 (Fed. Cir. 1992). Forney may, on remand, secure all of the relief she seeks. If she does, our decision on the merits of this appeal will have been wholly unnecessary. Review at this point would be subject to all of the disadvantages of piecemeal appeals; unnecessary decisions waste judicial effort, interfere unduly with the district courts or administrative agencies, and require us to adjudicate on less than a full record. *See Travelstead*, 978 F.2d at 1247. All of these considerations lead us to conclude that we ought not to entertain Forney's present appeal.[6]

[8] Forney argues, however, that our analysis leaves her in considerable danger. She is the prevailing party in her civil

[6]We do not follow, therefore, the example of the Tenth Circuit in *Nguyen v. Shalala*, 43 F.3d 1400 (10th Cir. 1994). There the court of appeals permitted a claimant to appeal a sentence-four remand order, stating in a footnote that such remand orders were "final and appealable" under *Finkelstein*. *Id.* at 1402 n.2. We have found no other published decision permitting appeal of such a remand order by a claimant. The outcome of the claimant's appeal was most unusual; the remand order, which had been invited by the Secretary, was held to be improper and the Secretary's denial of benefits was ordered reinstated. *Id.* at 1403-04. Thus the only party that appealed, the claimant, was left worse off for having appealed. We conclude that this scenario is unlikely to be repeated, and that appeal of a remand order by a claimant normally will leave further administrative proceedings to follow regardless of the outcome of the appeal. For that reason, judicial economy militates against permitting the prevailing claimant to appeal.

action that resulted in a remand. Yet on some of the issues she urged, the district court ruled against her. If she is denied benefits on remand, she must seek review by commencing a new civil action. *See Finkelstein*, 496 U.S. at 625 ("each final decision of the Secretary will be reviewable by a separate piece of litigation"); *Frizzell*, 937 F.2d at 255. In that new action, she contends, she is likely to be foreclosed by principles of res judicata, collateral estoppel, or even *stare decisis* from contesting the court's adverse rulings in the prior action. Thus, she contends, she must be allowed to appeal those issues now or forever lose her right to contest them.

[9] Although Forney's argument has some initial appeal, her dilemma is a false one. It is not surprising or unfair that, should Forney return to district court after being denied benefits on remand, the district court likely will adhere to its prior rulings. Even if the district court's remand had not been final, as *Finkelstein* requires it to be, the district court presumably would adhere to the law of the case and not reexamine its earlier rulings. The crucial question for Forney arises when she appeals to this court the adverse decision of the district court in her new civil action. Will she be foreclosed by principles of res judicata or collateral estoppel from litigating the issues decided against her in her first, final civil action, in which she "prevailed"?

[10] The answer is "no." In the first place, it is inappropriate to hold Forney to rulings that she was precluded from appealing. In *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983), we upheld a district court's refusal to hold the government collaterally estopped by an interlocutory ruling that it could not have appealed. *See also United States v. Weems*, 49 F.3d 528, 533 (9th Cir. 1995) (principle that government should not be bound by ruling it could not appeal inapplicable when opposing party appealed and government was able to litigate issue on cross-appeal).

[11] Second, collateral estoppel applies only to rulings that were essential to the judgment in the prior case. *Id.* at 532.

The judgment that Forney has just secured is a sentence-four remand to the Secretary. The district court's rulings against Forney on the issues of rejection of physician's testimony, discrediting of Forney's pain testimony, and inclusion of Forney's physical limitations in the expert's hypothetical questions, were all unnecessary to the remand. The remand was based solely on the error of the vocational expert in testifying that Forney could perform occupations requiring frequent or constant reaching. Thus Forney's case falls squarely within the *Restatement* example that we quoted approvingly in *Weems*, 49 F.3d at 533:

> A, as owner of a trademark, brings an action against B for infringement. B denies the validity of the trademark and denies infringement. The court finds that the trademark is valid, but that B had not infringed it, and gives judgment for B. Thereafter A brings an action against B alleging that since the rendition of judgment B infringed the trademark. B is not precluded from defending this action on the ground that the trademark is invalid.

Restatement Second of Judgments, § 27, comment h, Illustration 14, "Determinations Not Essential to Judgment" (1982). Thus Forney will not be bound in a future appeal by the adverse rulings that we do not permit her to appeal today.

III. Conclusion

Forney prevailed in district court by securing a remand to the Secretary pursuant to sentence four of 42 U.S.C. § 405(g). The remand order terminated her civil action favorably to her, and she is the prevailing party. As a prevailing party, she cannot appeal the remand order. Accordingly, Forney's appeal is

DISMISSED.

Entered on the Docket on 5-25-95
DONALD M. CINNAMOND
By [signature] Deputy

FILED
1995 MAY 24 P 4:12
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
BY [signature]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff(s), v. SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant(s).	)	CIVIL NO. 94-6357 JO
	)	JUDGMENT

Based on the record,

IT IS ORDERED AND ADJUDGED that this case be remanded to the Secretary for further proceedings.

DATED: May 24, 1995

ROBERT E. JONES,
U.S. DISTRICT JUDGE

JUDGMENT

FILED

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U.S. DISTRICT COURT

Entered on the Docket on
5/2/95
DONALD M. CINNAMOND
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SANDRA K. FORNEY, Plaintiff,	)	Civil No. 94-6357-JO
v.	)	OPINION AND ORDER
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	)	

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JONES, Judge:

Claimant Sandra Forney seeks judicial review of a final decision of the Secretary of Health and Human Services denying her application for supplemental security income benefits ("SSI") under the Social Security Act.

This Court has jurisdiction to review the Secretary's decision pursuant to 42 U.S.C. § 405(g). Following a careful review of the record, this court concludes that the Secretary's decision is not supported by substantial evidence and must be remanded.

ADMINISTRATIVE HISTORY

Claimant applied for SSI on November 18, 1991, and was initially denied benefits on February 10, 1992. The denial was affirmed on reconsideration. On March 15, 1993, a hearing was held before an Administrative Law Judge ("ALJ"). The ALJ found that claimant was not disabled, and denied her benefits. The Appeals Council granted claimant's request for review and remanded the claim to the ALJ on July 30, 1993.

After the second hearing on April 18, 1994, the ALJ again denied claimant's application for SSI. After the Appeals Council denied review, the ALJ's denial of benefits became the final decision of the Secretary.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence on the record as a whole. "Substantial

evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Tylitzki v. Shalala, 999 F.2d 1411, 1413 (9th Cir. 1993). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusion." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986). The Secretary's decision must be upheld if it is a rational interpretation of the evidence, even if there are other possible rational interpretations. Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989).

SUMMARY OF FACTS

At the time of the first hearing, claimant was 46 years old. Claimant attended high school through the tenth grade and later attained her GED in 1977. Her past work history includes positions as a cook, baker, and kitchen manager for a school.

Dr. Cross, claimant's treating physician, first diagnosed the possibility of fibromyalgia on August 11, 1988. Claimant showed signs of improvement and control over the fibromyalgia from the first diagnosis until July 26, 1991. Thereafter, her condition degenerated and Dr. Cross advised her to stop working because of the pain generated by the fibromyalgia.

Upon the advice of her treating physician, claimant quit her job. Claimant alleges that she is disabled due to the fibromyalgia, also known as fibrositis, and low grade depression stemming from her condition.

On November 18, 1991, claimant applied for SSI benefits. Claimant was examined by Dr. William Dudley as part of the

disability determination process. Dr. Dudley concluded that claimant's condition did not preclude all work. Based on Dr. Dudley's findings, the Secretary denied benefits.

On reconsideration, the Secretary again denied claimant's request for disability benefits, based on reports by Dr. Cross and by a clinical psychologist, Dr. Greenough, Ph.D. In his report, Dr. Cross advised that claimant is restricted to a maximum of 15 minutes of standing and 20 minutes of walking. He also limited claimant from lifting more than 15 pounds, or carrying that weight for more than 30 feet. Dr. Cross further concluded that claimant could work for only two hours during an eight hour day. Dr. Greenough diagnosed claimant with adjustment disorder with depression and characteristics of a dependent personality disorder.

At the hearing on January 13, 1993, a psychologist, Dr. Isabelle Moser, Ph.D., and a vocational expert testified as impartial experts. Both concluded from the evidence presented at the hearing that claimant is capable of working with moderate limitations. The vocational expert further testified that claimant cannot return to her past relevant work.

Claimant testified that she lives with her husband in an apartment. She exercises by walking two miles a day and by participating in water aerobics. For social activities, claimant visits with her family. Although claimant is able to do light housekeeping and grocery shopping, her husband performs the heavy work such as major grocery shopping and carrying laundry.

The ALJ concluded that claimant is not disabled and has the residual functional capacity to perform work that does not involve lifting more than 15 to 20 pounds or walking more than two miles, and that allows her to stand and change position at will. The ALJ doubted claimant's credibility as to the degree of pain she currently suffers.

After claimant appealed the ALJ's decision, the Appeals Council remanded the case for another hearing based upon its conclusion that the evidence did not support the ALJ's assessment of the claimant's residual functional capacity. On remand, the ALJ was instructed to obtain a consultative general medical examination.

The hearing on remand was held on March 15, 1994. Before the hearing, Dr. Nancy Brennan, D.O., examined claimant at the request of Disability Determination Services. Dr. Brennan's assessment of claimant's fibromyalgia was consistent with Dr. Cross's assessment. Both limit claimant's lifting capacity to 15 pounds, and standing or walking to 15-20 minutes without interruption. Dr. Brennan also determined that claimant could sit for six hours without interruption. Dr. Brennan further limited claimant from kneeling, balancing, crouching, or crawling, and from lifting, carrying, reaching over her head, or handling objects heavier than a pound or two for any length of time. Dr. Brennan also noted that claimant should limit activities requiring reaching, pushing, and pulling. Dr. Brennan advised that claimant should avoid surroundings that cause

external stress to her system. Finally, Dr. Brennan reported that claimant demonstrates a lapse of concentration and memory.

Claimant, her husband, Dr. Peter Moulton, Ph.D., and a vocational expert testified at the remand hearing. Claimant's testimony was substantially the same as in the first hearing, but she added that she had difficulty concentrating due to her pain. Her husband confirmed that testimony.

Dr. Moulton testified that claimant has a moderate limitation on daily activities, a slight limitation on social functioning, a high limitation in concentration, persistence or pace, and no limitation of deterioration or decompensation. He further testified that although claimant's impairments seriously limit her ability to function, they do not preclude work. Dr. Moulton also testified that claimant has an adjustment disorder brought on by pain from the fibromyalgia.

Although new evidence was presented at the second hearing, the vocational expert's testimony remained the same. The ALJ posed a hypothetical based on the reports of Dr. Brennan and Dr. Moulton. The vocational expert identified several jobs claimant could perform, such as telephone answering service operator and order clerk.

SUMMARY OF THE ALJ'S FINDINGS

The ALJ employed a five-step "sequential evaluation" process in evaluating claimant's disability.[1] The first step of the process requires the ALJ to determine whether claimant has been

[1] 20 C.F.R. § 416.920(a).

engaged in substantial gainful activity since her alleged onset of disability. Applying this criteria, the ALJ found that claimant's unsuccessful attempt to work after the onset of her disability was not substantial gainful activity.

Second, the ALJ must determine whether claimant has "severe" impairments which could impose more than a minimal limitation on the claimant's ability to perform basic work activities. Here, the ALJ found claimant to have "severe" impairments.

Third, the ALJ determined that claimant's impairments do not meet or equal any criteria in the Listing of Impairments of the musculoskeletal system because claimant did not provide appropriate physiological or psychological findings according to the listing requirements.

In the fourth step, the ALJ determine that claimant's impairments and consequent limitations prevented her from returning to her past relevant work as a baker, kitchen manager, or cook.

Last, the ALJ applied the Medical-Vocational Guidelines and determined that claimant retained the residual functional capacity for a modified range of light or sedentary unskilled work. Accordingly, the ALJ concluded that claimant is not under a "disability" as defined in the Social Security Act.

DISCUSSION

Claimant advances four arguments challenging the ALJ's findings. Claimant first argues that the ALJ failed to set forth specific and legitimate reasons for rejecting Dr. Cross's

findings. Claimant next argues that the ALJ's failure to make specific findings concerning the lack of credibility in her testimony is reversible error. Third, claimant asserts that the vocational expert's testimony was based on a hypothetical that did not include all of her limitations as described by her treating physician. Finally, claimant argues that the vocational expert's testimony is directly contrary to the Dictionary of Occupational Titles and Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles.

DISCUSSION

I. The ALJ Properly Based His Conclusion on the Evidence Presented.

In disability cases, the treating physician's opinion is given deference because the treating physician "'is employed to cure and has a greater opportunity to know and observe the patient as an individual.'" Magallanes, 881 F.2d at 751. A treating physician's opinion is not, however, necessarily conclusive "as to either a physical condition or the ultimate issue of disability." Id. Indeed, "[t]he ALJ may disregard the treating physician's opinion whether or not that opinion is contradicted." Id. This is particularly true where the opinion is "'brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion.'" Id. (citation omitted).

To reject the opinion of a treating physician, the ALJ must make findings setting forth specific, legitimate reasons that are based on substantial evidence in the record. "'The ALJ can meet

this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.'" Magallanes, 881 F.2d at 751, quoting Cotton v. Bowen, 799 F.2d 1403, 1408 (9th Cir. 1986); see also Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987).

Claimant testified that she is active for more than two hours a day on a regular basis. That testimony directly contradicted Dr. Cross's report that claimant could work no more than two hours a day. Because of claimant's contradictory testimony, the ALJ rejected Dr. Cross's opinion. The ALJ did not err in rejecting Dr. Cross's report on that basis.

II. The ALJ's Finding that Claimant Lacked Credibility is Substantiated by the Evidence.

Credibility determinations ordinarily are within the province of the ALJ. See Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989). However, "once the claimant produces objective medical evidence of an underlying impairment, an adjudicator may not reject a claimant's subjective complaints based solely on a lack of objective evidence to fully corroborate the alleged severity of pain." Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Nonetheless, "an adjudicator may find the claimant's allegations of severity to be not credible [provided that] the adjudicator * * * specifically makes[s] findings which support this conclusion." Id. In his findings, the ALJ noted that claimant's testimony was incongruous to her alleged pain:

> She was capable of attention to all questions asked, and her responses were rational, although somewhat evasive. . . . [S]he no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony.

The above reasons constitute specific findings and are sufficient to support the ALJ's conclusion that claimant's allegations of back pain were not credible.

III. The ALJ's Hypothetical Questions were not Improper.

The ALJ's hypothetical questions incorporated all of claimant's relevant limitations as presented by Dr. Brennan and Dr. Moulton. As stated above, the ALJ disregarded Dr. Cross's report because of claimant's contradictory testimony. The ALJ was not, therefore, required to incorporate Dr. Cross's findings in the questions posed to the vocational expert. The ALJ's hypothetical questions were not improper.

IV. The Vocational Expert's Testimony is Contrary to Dr. Brennan's Report.

Because claimant proved that her condition prevents a return to her previous occupation, the Secretary has the burden to show that the claimant can engage in substantial gainful work in the economy. Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993) (citing Gallant v. Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984)).

Although Dr. Brennan reported that claimant's ability to reach is impaired, the occupations identified by the vocational expert require frequent or constant reaching. The ALJ did not reject Dr. Brennan's assessment that claimant's ability to reach is impaired. Consequently, the ALJ's conclusion that claimant

was capable of performing other substantial gainful activity was not supported by substantial evidence because he only considered occupations which require movement beyond claimant's limitations. Accordingly, the Secretary has not sustained her burden of showing that claimant can engage in substantial gainful work in the economy, and the case must be remanded.

CONCLUSION

Based on a review of the record, the Secretary did not sustain her burden of proof in step five of the five-step evaluative process in determining whether claimant is entitled to benefits. IT IS ORDERED that this case be REMANDED to the Secretary for further proceedings in accordance with this opinion.

DATED this 20th day of April, 1995.

ROBERT E. JONES
United States District Judge

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Sandra K. Forney (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner)	546-66-9538 (Social Security Number)

This case is before me on an order from the Appeals Council, remanding the case for further proceedings, including a new hearing. The claimant's application for disability insurance benefits was filed on November 18, 1991. She alleged that she had been disabled since June 7, 1991, due to fibrositis. Following proper notice, a hearing was held on January 13, 1993, in Bend, Oregon, after which I issued a decision denying entitlement to benefits. The claimant, who was unrepresented at the first hearing, has now obtained counsel, Philip H. Garrow, Attorney at Law.

A supplemental hearing was held on March 15, 1994, in Bend, Oregon, at which the claimant appeared personally and testified. She was represented by her attorney. Leon Forney, the claimant's husband, testified on her behalf. Peter G. Moulton, Ph.D., testified as a medical expert. Richard C. Ridenour testified as a vocational expert.

In deciding whether or not the claimant is disabled, I must follow a step-by-step evaluation process set forth in the regulations at 20 CFR 404.1520 and 416.920. The first step of this process asks whether or not the claimant has engaged in substantial gainful work activity since the alleged onset date of disability. The claimant has continued to be unemployed since her first hearing. Prior to that time, as noted in the previous decision, she worked as a kitchen manager, baker and cook from September 4, 1991 to October 2, 1991 and earned approximately $1600 (Exhibit 10). Under the regulation at 20 CFR 404.1574(b),

I find that the claimant's work activity was an unsuccessful work attempt and not substantial gainful activity. The claimant met the insured status requirements of the Social Security Act on June 7, 1991, her alleged onset date, and she will continue to meet those requirements through December 31, 1995.

The second step in the evaluation process asks whether or not the claimant has a "severe" impairment within the meaning of the Social Security Act. An impairment is considered to be "severe" if it imposes more than a minimal restriction on an individual's capacity to perform work related activity (20 CFR 404.1521 and 416.921).

In December 1991, the claimant alleged that she was forced to stop working because of continuous pain. However, she stated that she did laundry once a week, cleaned the bathroom once a week, did the dishes once a day, made the bed once a day, and swept, mopped, and vacuumed occasionally. She also did shopping for small food items and her husband helped her with shopping once a week for larger articles. She walked up to two miles a day and did water exercises.

At the supplemental hearing, the claimant testified that every day except Sunday she does water aerobics and simple stretching exercises. Also daily, she does some housework, approximately one hour, makes one trip to the store, reads, and cooks meals, although she sometimes burns pots when cooking dinner. She walks five blocks three times a week to visit her parents, and her children and grandchildren come to see her two to three times a month. Walking causes burning in her muscles, but she does not have any problems with her forearms. She described fatigue which occurs between one and two p.m., and stated that she has to lie down and rest then. She said that her doctor agrees that she cannot return to work. Her medications include amitriptyline, ibuprofen, Premarin, and Flexeril, and she does not have headaches as long as she takes ibuprofen. She testified that she could not sleep prior to the introduction of amitriptyline and Flexeril, but now sleeps between 11:00 and 7:30 a.m. She said that she feels more energetic mentally, but her concentration is still poor.

The claimant's husband testified that he used to come home and find the claimant crying. He stated that she cannot drive their pickup truck and that he goes shopping with the claimant and carries groceries.

The claimant's treating physician is Steven W. Cross, M.D. As discussed in the previous decision, he has treated the claimant since 1988, although her findings were minimal at that time. On July 26, 1991, his chart notes reveal that her fibrositis and hypertension were controlled. However, on October 7, 1991, he reported that she was no longer able to work because the pain was too great for the amount of time she spent on her feet. He continued to describe her as incapable of working as a cook or a baker through January 6, 1992, and said that she was unable to stand for more than 15 minutes at a time, walk for more than 20 minutes at a time, lift more than 15 pounds, or carry more than 15 pounds for more than 30 feet. He stated that she could "maybe" work two hours of an eight hour day. However, thereafter he reported that the claimant was walking two miles a day and doing water aerobics. She was able to sleep at night because she took Flexeril and amitriptyline. A sedimentation rate, ANA test, and a rheumatoid factor rate were all negative. On August 14, 1992, Dr. Cross' diagnosis was fibrositis, presently controlled, and he indicated that he would only need to see the claimant every three months (Exhibits 15, 19 and 21).

Additional evidence submitted by the claimant reveals that she saw Paul H. Altrocchi, M.D., for complaints of headaches, neck pain and back aches in 1985, and was prescribed short-term bed rest and Robaxin (Exhibit 31). The claimant's disability retirement was approved by the Oregon Public Employees Retirement System on February 24, 1992 (Exhibit 33).

On May 4, 1992, the claimant saw James W. Greenough, Ph.D., for a psychological assessment at the request of Disability Determination Services. She gave the impression of at least average intellectual potential, with some loss of memory and concentration abilities secondary to her preoccupation with pain. She described her mood as somewhat depressed, but less so since she had been taking antidepressant medication over the last year. The diagnoses were adjustment disorder with depression and characteristics of a dependent personality disorder (Exhibit 16).

In September 1992, the claimant saw Terry L. Schrader, M.D., for a psychiatric evaluation, at which she reported that she had been unable to continue working as a cook/manager since October 1991. She described herself as initially in a state of denial and stated that she experienced a certain amount of depression, but was now following an active schedule pursuant to her doctor's orders. She found walking up to two miles a day, water exercise, and a jacuzzi tub to be the most helpful. She took a lot of time

to do her housework, but she got it done. She slept between midnight and seven or eight a.m., and usually rested during the day. Her medications included amitriptyline, Flexeril, ibuprofen, Premarin, and an anti-hypertensive medication, and she described them as helpful, although the amitriptyline caused mild side effects such as a dry mouth. Dr. Schrader found her MMPI profile to be valid, with no evidence of a tendency to exaggerate her symptoms, and consistent with mild depression and her diagnosis of fibrositis. The claimant believed that her pain management was better than it was a year ago, although she still had pain complaints. She stated that pain "no longer controlled her life" (Exhibit 32).

On December 6, 1993, the claimant saw Nancy L. Brennan, D.O., for a physical examination at the request of Disability Determination Services. The claimant described her two major complaints as generalized muscular pain and muscular weakness. On physical examination, Dr. Brennan noted slow gait, but no foot drop or antalgic gait, and she was able to balance herself on one foot. She had a significant number of tender points, consistent with fibromyalgia. She had reduced range of motion of her shoulder and gross tremor of the tested extremity with exertion. Her cervical range of motion was normal; however, when she flexed her lumbar spine greater than 90 degrees, she did not have the muscle strength to pull her trunk erect and used her hands to "walk" up her thighs. Her quadriceps were unable to raise her body from a squatting position; she had difficulty rising from a low seated position; and she was unable to perform this maneuver repetitiously. Dr. Brennan opined that the claimant would be unable to sit, stand, or walk for any appreciable length of time without shifting or weight or moving about to a new position. She was sure that she would be unable to lift, carry, reach over her head, or handle objects heavier than a pound or two for any length of time. She also exhibited a lapse of concentration and some lapses in her memory (Exhibit 34, pages 1-4).

However, on a medical assessment of the claimant's ability to do work-related activities, Dr. Brennan stated that the claimant could occasionally lift 10-15 pounds, could stand/walk for a total of two to three hours in an eight hour day, 15 minutes at one time, and could sit for a total of six hours in an eight hour day, 45 minutes at one time. However, she noted that the limitations on sitting were by patient-given history, and there was no evidence of limitation on examination. She thought the claimant could occasionally climb and stoop, but never kneel, balance, crouch or crawl. She said that reaching and pushing and

pulling would aggravate the claimant's trigger points. She noted that the claimant should not be around temperature extremes or noisy environments, because external stress to the system often causes exacerbation of fibromyalgia symptoms (Exhibit 34).

Dr. Cross' chart notes reveal that he saw the claimant in March 1993 for a follow up on her blood pressure, which needed medication adjustment, and in April 1993, for a follow up on her fibrositis. In April she reported that she was feeling better on Daypro, and having less burning in her stomach. In July 1993 she revealed that she was walking two miles a day, doing water aerobics, and taking her medication. She did some housework, usually dishes, and occasionally had a day where she could clean the whole house, but then would suffer for it the next day. She was maintaining a good attitude and Dr. Cross described her fibromyalgia as chronic and stable. On October 27, 1993, Dr. Cross reported that she was still exercising, and on February 1, 1994 he stated that she was doing six days a week of water aerobics and staying active. She said that she did not want to end up like other people with the problem in wheelchairs and walking aids. At the last notation, her medications included ibuprofen, amitriptyline, Premarin, and calcium (Exhibit 37).

On February 9, 1994, the claimant received a physical capacity evaluation from Physical Therapy Associates. The claimant described morning stiffness and symptoms primarily aggravated by prolonged static posture or bending and lifting activity. Her current daily activities included minimal housework with delayed soreness, water aerobics class, and walking up to two miles per day. The claimant demonstrated significant deconditioning in her extremities and trunk for repetitive bending, sustained stand/walk, and repetitive materials handling tolerance. The evaluator thought that the claimant was limited to part-time sedentary work; however, of the three factors considered, only one involved consideration of her "poor to fair" pain management. The other two were her deconditioning and her length of time off of work (Exhibit 38). The claimant's deconditioning for repetitive materials handling, the only portion applicable to sedentary work, was based upon her performance on timed tests which are subject to equivocal exertional efforts and possibly distorted results. Additionally, deconditioning may be related to the time lapsed since active employment. Although considered a factor for certain portions of disability assessment, such as the transferability of acquired work skills from jobs which were performed over 15 years in the past, the relatively short period of time the claimant has been unemployed would not be a factor in

her evaluation for Social Security purposes. Therefore, although the claimant's limitation to sedentary or limited light work has been established and confirmed by observation and is not unusual for her diagnosis, her limitation to part-time work found by this evaluation is considered to be based upon subjective factors within the control of the individual. As will be further discussed below, I find that the claimant is prone to exaggeration of her restrictions and subjective symptomatology, and that therefore a limitation to part-time work is not reasonable under the circumstances and not supported by the other evidence of record.

At the hearing, Peter Moulton, Ph.D., testified as a medical expert. He stated that the claimant's diagnoses are fibrositis and mild dysthymia, which has been helped by medication. He thought that she had moderate limitations on her activities of daily living and slight difficulties in maintaining social functioning, but that she often had deficiencies of concentration, persistence, or pace. He said that she was moderately limited in her ability to understand, remember and carry out detailed instructions, her ability to maintain attention and concentration for extended periods, and in her ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. He did not think that she was significantly limited in any other categories.

Upon consideration of the evidence in its entirety, I find that the record establishes a combination of severe impairments that impose more than a minimal limitation on the claimant's ability to perform basic work activities (Exhibit 25 and 20 CFR 404.1520(c), 404.1520a(c) and 404.1521). However, these impairments do not meet or equal any of the criteria of the Listing of Impairments contained in Appendix 1, Subpart P, Regulations No. 4.

The claimant's fibrositis has been evaluated under the Listings at 1.00 et seq. for the musculoskeletal system. Other than complaints of pain, the claimant does not have the appropriate abnormal signs or laboratory findings required to satisfy the requirements of any Listing under this section. The claimant's mental symptomatology does not meet or equal the requirements of any of the impairments for mental disorders, as documented in the evidence of record and confirmed by Dr. Moulton's testimony. A psychological review technique form has been prepared reflecting

this determination and is attached to this decision. As disability is not established pursuant to the criteria of 20 CFR 416.920(d), further evaluation in this claim requires an assessment of the claimant's residual functional capacity.

In assessing the claimant's residual functional capacity, consideration has been given to the claimant's testimony regarding pain and discomfort. Pain, when associated with a medically determinable impairment which could produce pain, may be of such severity as to cause an individual to be under a "disability." However, the inability of a claimant to work without some pain and discomfort does not necessarily satisfy the test for disability under the provisions of the Act. Kroeneke v. Richardson, 363 F.Supp. 891 (D.Or.1973); Valdez v. Heckler, 616 F.Supp. 933, 940 (D.C.Cal.1985).

As noted in Social Security Ruling 88-13, the related "symptoms" of pain are the individual's own perception of the effects of the physical or mental impairment. Because of the subjective characteristics of symptoms and the absence of reliable techniques for measurement, symptoms (especially pain) are difficult to prove, disprove or quantify. This ruling notes a need for a sound medical basis for the disability decision as well as consideration of the claimant's symptoms. The ruling, which is binding upon an Administrative Law Judge in the consideration of symptoms (including pain) in the evaluation of disability cases (20 CFR § 422.406(b)(1)), reiterates the policy set forth in the Social Security Regulations (20 CFR § 404.1529 and § 416.929), which provide that pain cannot be found to have a significant effect on a disability decision unless medical signs or laboratory findings show that a medically determinable physical or mental impairment is present that reasonably could be expected to produce the pain alleged.

In determining the level and severity of pain, pertinent evidence has been considered such as: descriptions of the claimant's daily activities; frequency, amounts and effects of any medications; the claimant's appearance and credibility; any comments of physicians appearing of record; objective clinical laboratory findings, or the lack thereof; and the existence or nonexistence of any observable signs or significant pathological abnormalities associated with and resulting from severe and intense pain. If it is found that a claimant's testimony relating to the intensity of his or her pain and other limitations is unreliable, a credibility determination is to be made citing the reasons why the testimony is unpersuasive.

Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991). In this regard, questions of credibility and resolutions of conflicts in the testimony are functions solely of the Secretary. Yuckert v. Bowen, 841 F.2d 303, 307 (9th Cir.1988); Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir.1982); Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir.1971).

In accordance with the criteria set forth above, the record fails to document incapacitating symptomatology to the extent and degree alleged by the claimant. The record reflects significant discrepancies and/or omissions between the claimant's reports to various medical personnel and to the Agency. She alleges severe, incapacitating pain in one instance, and then, on another, states that her condition has undergone significant improvement with treatment and medication. She told Dr. Schrader that her pain management was better than it was a year previously, and that pain no longer controlled her life, a statement which is substantially reproduced in her reports to Dr. Cross, and yet she told Dr. Brennan that her generalized muscular pain was a "10" on a scale of 1 to 10. In the latter instance, she was aware that she was undergoing a physical examination with emphasis on evidence of fibrositis and its severity.

While it is essentially uncontroverted that the claimant is incapable of returning to work as a managerial cook, work which she described as involving standing up to seven hours a day and frequently lifting up to 50 pounds (Exhibit 9), despite her allegations, the record does not establish the legitimacy of her other complaints. Even after considering her assertions of extreme pain, Dr. Brennan found that she was capable of sitting for up to six hours a day, walking or standing up to three hours a day, and occasionally lifting 10 to 15 pounds. The physical capacities evaluation likewise found that she was capable of sedentary work, and, although a further reduction to part-time work was noted, that reduction was based upon tests which are capable of distortion based upon equivocal effort, as previously discussed.

The claimant's activities are commensurate with a capacity for sedentary work, and even occasional light work. Another example of her somewhat misleading testimony is that she failed to mention at the hearing that she can occasionally clean her whole house in one day. Her list of daily activities is quite broad, and while it is noted that she does not drive, apparently the only vehicle available is a pick-up truck. She does housework, exercises, cooks, reads, and goes shopping daily. She does more

extensive activities several times a week. The record does not support a conclusion that she must lie down for a protracted period every day, and Dr. Brennan did not note such a significant disruption in her ability to perform activities during the day. Therefore, I conclude that this resting period is not medically imperative.

I do not find the claimant's testimonial reports or subjective reporting of her capacity to be the most reliable evidence of record upon which to base an assessment of her residual functional capacity. The only physician to currently render a physical capacities evaluation is Dr. Brennan, and her assessment indicates that the claimant is capable of working. Dr. Cross has not recently expressed an opinion, and subsequent to his statement that the claimant might be limited to two hours per day (with apparent reference to her work as a cook), he has repeatedly reported that her condition has improved or stabilized. Even the claimant herself acknowledges that she is capable of more activity than that encompassed by two hours per day. In fact, she does at least two hours of work per day at an exertional capacity beyond sedentary, if both her housework and her exercise routine are considered. Although the claimant stated that her doctor supports her contention that she cannot return to work, it is conceded that she cannot return to work as a baker or a cook. Other work is not precluded by a statement that she could not return to work she had been doing in the past.

The claimant's demeanor at the hearing was not indicative of an individual who is experiencing disabling incapacity; she did not appear to be in pain or require a period in which to rest. She was capable of attention to all questions asked, and her responses were rational, although somewhat evasive. Her medications are very conservative, but even this conservative treatment has produced considerable relief of her symptoms. For example, she no longer has difficulty sleeping regularly, she no longer has headaches, and she has reported improvement in her musculoskeletal pain to her examining and treating physicians, in contrast to her testimony. Upon consideration of the evidence in its entirety, I find that the subjective reports of the claimant and her witness are not credibly supported by the weight of the evidentiary record to the extent alleged pursuant to the criteria of SSR 88-13.

I find that the claimant is capable of sedentary or light work within the ranges described below; however, based upon the testimony of the vocational expert at the hearing, and as

previously discussed above, this precludes the performance of her past relevant work. If the claimant cannot return to her past relevant work, then the Secretary must assume the burden of showing that despite her impairments and in light of her age, education and work experience, there is still other work she can perform, which exists in significant numbers in either the claimant's regional economy or in the national economy or both.

At the hearing, Richard Ridenour testified as a vocational expert. Although he stated that the claimant could not perform her past relevant work as a head cook, a baker, or manager of a school lunch room program if she were limited to the sedentary or light exertional level, he testified that the claimant has acquired skills from that work which are transferable to other semi-skilled work. He identified these skills as involving public contact and service to the public. The claimant is 47 years old and has the equivalent of a high school education. She was 44 years old at her alleged onset date. Given a hypothetical question limiting the claimant to work that does not involve lifting more than 15 to 20 pounds or walking more than two miles, and which allows her the ability to stand and change position at will, and also considering her vocational factors, Mr. Ridenour testified that the claimant could perform work as an order clerk and a telephone answering service operator. Given an additional hypothetical question limiting the claimant in accordance with the functional capacity assessment described by Dr. Brennan and further considering the limitations described by Dr. Moulton at the hearing, in addition to her vocational factors, Mr. Ridenour testified that she could still perform the jobs in question. Finally, given a hypothetical question based upon the physical capacity evaluation performed by Physical Therapy Associates, found in Exhibit 38, in addition to the same psychological limitations and vocational factors, Mr. Ridenour's testimony remained unchanged. As I have determined that the claimant can perform sedentary work as described on a full-time basis, she would be able to perform the jobs of order clerk and answering service operator full-time. Mr. Ridenour testified that there are over 850,000 such jobs in the national economy.

In summary, I find that the jobs delineated by the vocational expert support a conclusion that the claimant has had the ability to perform a wide range of sedentary work existing in significant numbers in the national economy during the period relevant to this adjudication. Therefore, the framework of Rules 201.21 and 201.22 of Appendix 2, Subpart P, Regulations No. 4 directs a

conclusion that she is not under a disability. Accordingly, I find that the claimant is "not disabled," as defined by the Social Security Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on June 7, 1991, the date the claimant stated she became unable to work, and will continue to meet them through at least December 31, 1995.

2. The claimant has not engaged in substantial gainful activity since June 7, 1991.

3. The medical evidence establishes that the claimant has a combination of severe impairments, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's testimony, and that of her husband, was not fully credible.

5. The claimant has the residual functional capacity to perform work as described in the decision above (20 CFR 404.1545).

6. The claimant is unable to perform her past relevant work as a head cook, a baker, and a manager of a school lunch room program.

7. The claimant's residual functional capacity for the full range of sedentary work is reduced by the limitations described in the decision above.

8. The claimant is 47 years old, which is defined as a younger individual (20 CFR 404.1563).

9. The claimant has the equivalent of a high school education (20 CFR 404.1564).

10. Considering the claimant's younger age, transferability of skills is not a material factor in the determination of disability; however, the claimant has acquired work skills which are transferable to other semi-skilled work, such as working with and serving the public.

11. Based on an exertional capacity for sedentary work, and the claimant's age, education, and work experience, section 404.1569 and Rules 201.21 and 201.22, Table No. 1, Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of "not disabled."

12. Although the claimant's additional nonexertional limitations do not allow her to perform the full range of sedentary work, at the hearing a vocational expert testified that there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: food and beverage order clerk and telephone answering service operator. There are over 850,000 such jobs in the national economy.

13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f)).

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on November 18, 1991, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

STEPHEN P. KRAMER
Administrative Law Judge

APR 18 1994
Date

DEPARTMENT OF HEALTH & HUMAN SERVICES — Social Security Administration

Refer to: S3GCM
546-66-9538

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Sandra K. Forney
61354 Blakley, Apt A1
Bend, OR 97702

Dear Ms. Forney:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on April 18, 1994.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council considered your attorney's brief dated June 8, 1994. He contended that the Administrative Law Judge's conclusions were not supported by substantial evidence; that he did not give adequate weight to the opinion of Steven W. Cross, M.D. (Exhibit 15) and that he did not properly assess your testimony about your symptoms. The hearing decision contains extensive rationale on the conclusions reached which cites clinical findings, medical opinion more recent than Dr. Cross' (Exhibits 34, 39), treatment, medication, daily activities and the evidence from medical and vocational experts. Accordingly, the Appeals Council finds no basis in your attorney's brief for changing the hearing decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel of the Department of Health and Human Services at 200 Independence Avenue, S.W., Washington, D.C. 20201. (See rules 4(c)(2) and (d)(4) and (5) of the Federal Rules of Civil Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

ORIGINAL SIGNED BY
Peter A. Greenlee
Administrative Appeals Judge

cc:
Philip H. Garrow, Esq.
HO, Eugene, OR (ALJ Kramer)

NOT FOR PUBLICATION

FILED

MAY 29 1997

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANDRA K. FORNEY, Plaintiff-Appellant, v SHIRLEY S. CHATER, Secretary, Commissioner, Social Security Administration, Defendant-Appellee.	)	CA No. 95-35560 DC No. CV-94-06357 O R D E R

BEFORE: CANBY, RYMER and KLEINFELD, Circuit Judges

Appellant's petition for rehearing is DENIED.